

June 17, 2015

The Honorable Ronald H. Johnson  
Chairman, Committee on Homeland Security & Governmental Affairs  
United States Senate  
Washington, DC 20510

The Honorable Thomas R. Carper  
Ranking Member, Committee on Homeland Security & Governmental Affairs  
United States Senate  
Washington, DC 20510

Dear Chairman Johnson and Ranking Member Carper:

As current and former heads and senior officials of independent regulatory agencies, we write to express our support for the Independent Agency Regulatory Analysis Act of 2015, legislation introduced by Senator Rob Portman, Senator Mark Warner, and Senator Susan Collins. This bipartisan reform would promote a more cost-effective approach to regulation by affirming the President's authority to extend to independent agencies the same principles of regulation that have long governed executive agencies.

For more than thirty years, presidents of both parties have required executive agencies to follow a set of "burden-reducing, cost-saving principles"<sup>1</sup> in crafting new regulations, with review by the Office of Information and Regulatory Affairs. This regulatory analysis and review regime was initiated under President Carter, formally established by President Reagan, took its current form under President Clinton, and was reaffirmed by President Obama in Executive Order 13,563. Central to the executive order framework is the duty to assess the benefits and costs of major new regulations. There is a broad consensus among policymakers, administrative law practitioners, and scholars that this approach has improved the quality of regulation by helping to set appropriate priorities for rulemaking and limit unnecessary burdens.<sup>2</sup>

Unfortunately, these principles have not yet been extended to independent agencies, despite the Justice Department's longstanding, bipartisan position that the President has full authority to do so.<sup>3</sup> We believe it is time to close the gap. The justification for cost-benefit analysis and review applies no less to independent agencies than to executive agencies. Yet according to a recent Office of Management and Budget report, not one of the 18 major rules

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<sup>1</sup> Executive Order 13,563 (2011) (President Obama).

<sup>2</sup> See, e.g., Cass Sunstein, *The Stunning Triumph of Cost-Benefit Analysis*, Bloomberg (Sept. 12, 2012).

<sup>3</sup> See Mem. for Simon Lazarus, Assoc. Dir. Domestic Council, from John Harmon, Ass't Atty. Gen., Off. of Legal Counsel (Jul. 22, 1977) (concluding that the President has authority to extend regulatory impact analysis and centralized review requirements to independent agencies); Mem. for the Hon. David Stockman, Director of OMB, from Larry L. Simms, Acting Ass't Atty. Gen., Off. of Legal Counsel 7 (Feb. 12, 1981) (same); Testimony of Sally Katzen 8, Hearing: Federal Regulation, S. Comm. on Homeland Security & Govtl. Affairs (July 20, 2011) (describing Clinton Administration position).

issued by independent agencies in 2013 was based on a complete, quantified cost-benefit analysis.<sup>4</sup> The same was true in 2012, 2011, 2010, and 2009. Commentators have likewise concluded that independent agencies are routinely issuing major regulations “without reporting any quantitative information on benefits and costs—apart from the paperwork burden—that would routinely be expected from executive branch agencies.”<sup>5</sup> This despite President Obama’s directive, in Executive Order 13,579, that independent regulatory agencies “should comply” with the provisions of a previous Executive Order (No. 13,563) requiring federal agencies to “propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs.”

Against this background, the call for reform has been bipartisan. Indeed, President Obama’s Jobs Council recommended that “a requirement that [independent agencies] must conduct regulatory impact analyses, coupled with some form of third-party regulatory review (through OIRA or some other office), would prompt [independent agencies] to perform better analyses and to issue better and smarter regulations.” The American Bar Association and the Administrative Conference of the United States have also long recommended extending the regulatory analysis and review framework to independent agencies by executive order.<sup>6</sup>

The proposed legislation takes a thoughtful approach to this issue by affirming the authority of the President to extend to independent agencies the same principles that apply to executive agencies. The bill adopts a balanced approach to accountability by providing for OIRA review of economically significant regulations, followed by a public exchange of views between OIRA and the independent agency concerning the quality of the agency’s cost-benefit analysis and other basic considerations. In this respect, it takes an approach quite similar to that Congress took in providing for review of independent agency actions under the Paperwork Reduction Act.

Thus, despite some mistaken assertions to the contrary, the proposed legislation carefully preserves the independence of the affected agencies. The bill explicitly states that OIRA’s assessment of independent agency rules submitted for review is “nonbinding.”<sup>7</sup> Accountability comes through the public exchange of views between OIRA and the agencies. The bill does not permit judicial review of an agency’s compliance with the terms of the executive order, and it confers no power on OIRA to stop independent agency rules.

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<sup>4</sup> Office of Management & Budget, *2014 Report to Congress on the Benefits and Costs of Federal Regulations*, pp. 34-37, 106-107; see also Curtis Copeland, *Economic Analysis & Independent Regulatory Agencies*, Report for the Administrative Conference of the United States, pp. 87-89 (Apr. 30, 2013) (reporting that out of the 21 major rules issued by independent agencies in 2012, only one rule was supported by a partial quantification of benefits and only 6 rules included a partial quantification of costs, aside from paperwork burdens).

<sup>5</sup> Arthur Fraas & Randall Lutter, *Economic Analysis of Regulations at Independent Regulatory Commissions*, Resources for the Future Conference Paper (April 7, 2011).

<sup>6</sup> The ABA resolution is reprinted in Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 Admin. L. Rev. 181, 206-07 (1986) (appendix) (“The constitutional principles that justify presidential involvement in rulemaking activities are applicable to both the executive and the independent agencies. The executive orders should be extended to the independent agencies because of the need for presidential oversight of all administrative rulemaking activities.”); ACUS Recommendation 88-9, *Presidential Review of Agency Rulemaking*, 54 Fed. Reg. 5207 (Feb. 2, 1989), ¶ 2 (“As a matter of principle, presidential review of rulemaking should apply to independent regulatory agencies to the same extent it applies to the rulemaking of Executive Branch departments and other agencies.”).

<sup>7</sup> Section 3(c).

Independent agencies play a vital role in implementing regulatory statutes governing major sectors of our nation's economy. Based on our experience, these agencies are fully capable of adhering to the same commonsense principles of regulation that have long governed their executive agency counterparts. The Independent Agency Regulatory Analysis Act of 2015 would advance that important goal.

Sincerely,

Nancy Nord  
Commissioner & Acting Chairman (2006-13)  
Consumer Product Safety Commission

Peter Strauss  
General Counsel, Nuclear Regulatory Comm. (1975-77)  
Betts Professor of Law, Columbia Law School

Sharon Brown-Hruska  
Commissioner (2002-04) & Acting Chairman (2004-05)  
Commodity Futures Trading Commission

William P. Albrecht  
Commissioner (1988-93) & Acting Chairman (1993)  
Commodity Futures Trading Commission

Timothy Muris  
Chairman (2001-04)  
Federal Trade Commission

James C. Miller III  
Chairman (1981-85)  
Federal Trade Commission

Lawrence B. Lindsey  
Member, Federal Reserve Board of Governors (1991-97)

Michael K. Powell  
Chairman (2001-05)  
Federal Communications Commission

Anne Northup  
Commissioner (2009-12)  
Consumer Product Safety Commission

cc: Senator Rob Portman  
Senator Mark Warner  
Senator Susan Collins